

STRICTLY CONFIDENTIAL



2015 EXAMINATIONS

KNOWLEDGE LEVEL

PAPER 2 : LEGAL FRAMEWORK

TUESDAY 1 DECEMBER 2015

TIME ALLOWED : 3 HOURS

SUGGESTED SOLUTIONS

SECTION A

1. (a) As a general rule, the doctrine of binding precedent requires a judge or other judicial officer of an inferior court to be bound by and therefore apply a precedent created by a judge of superior court. However, there are certain circumstances when a judge of an inferior court may choose not to be bound by or may disregard, an earlier precedent of a superior court even if it appears to be binding. The judge may do this in the following circumstances:
 - (i) by distinguishing the facts of the case before him and those of a previous case in which a precedent was created.
 - (ii) by declaring that the *ratio decidendi* in the previous case was obscure, especially if the decision by three or five judges gives many *rationes decidendi*.
 - (iii) by declaring that the previous decision was made *per incuriam*, that is, without taking into account of some essential point of law, such as an important precedent.
 - (iii) by declaring a precedent to be in conflict with the law or any fundamental principle of law, for example, where a court has failed to apply the doctrine of privity of contract as formulated in ***Beswick v Beswick (1968)***.
 - (v) by declaring the precedent to be too wide, for example, the duty of care to third parties as formulated in ***Donoghue v Stevenson (1932)***.
 - (vi) because the earlier precedent has been subsequently overruled by another court or statute.
- (b) Parliament exercises control over delegated legislation by restricting and defining the power to make rules and by keeping and making new delegated legislation under review. Some statutory instruments must be laid before Parliament for scrutiny and approval. They do not become effective until approved by an affirmative resolution of Parliament. Most other statutory instruments must be laid before Parliament for 40 days before they take effect. During that period, members may propose a negative resolution to veto a statutory instrument to which they object.

There are standing scrutiny committees in Parliament whose duty is to examine statutory instruments with a view to raising objections, if necessary, usually on the ground that the instrument is obscure, expensive or retrospective.

The power to make delegated legislation is defined by an Act of Parliament which confers that power. A statutory instrument may be challenged in the courts on the

ground that it is *ultra vires*, that is, it exceeds the prescribed limits, or on the ground that it has been made without due compliance with the correct procedure. If the objection is valid, the court declares a statutory instrument to be void.

2. (a) It is true that acceptance of an offer which purports to introduce new terms in a contract is a counter-offer. This is so because the offeree must give an unconditional or an unqualified acceptance. If acceptance is conditional or qualified, a contract is not created. Consequently, neither party acquires any rights or has any obligation under it. If a counter offer is made by the offeree, the original offeror may accept it, but if he rejects it, his original offer is no longer available for acceptance.

In *Hyde v Wrench (1840)*, the defendant offered to sell property to the claimant for £1,000. Two days later, the claimant made a counter-offer of £950 which the defendant rejected. The claimant then informed the defendant that he had accepted the original offer of £1,000. The court held that the original offer of £1,000 had been terminated by the counter-offer of £950.

- (b) The terms of a contract may either be conditions or warranties. The difference between the two terms in a contract are as follows:

A condition is a very important term in a contract. It is fundamental because it goes to the root of a contract. The legal effect of this term is that if breached by one party to the contract, the innocent party is entitled to treat the contract as discharged and free himself from any obligations under it.

In *Poussard v Spiers (1876)* Madam Poussard agreed to sing in an opera throughout a series of performances. Due to illness, she was unable to appear on the opening night. The producer engaged a substitute who insisted that she should be engaged for the whole run. When Madam Poussard recovered, the producer declined to accept her services for the remaining performances. The court held that failing to sing on the opening night was a breach of a condition which entitled the producer to treat the contract for the remaining performances as discharged because singing on the opening night was regarded as fundamental to the contract.

On the other hand, a warranty is a minor term in a contract which does not necessarily go to the root of a contract. The legal effect is that a breach of a warranty entitles the innocent party to claim damages for the breach and not to regard the contract as discharged.

In *Bettin v Gye (1876)*, an opera singer was engaged for a series of performances under a contract under which he had to perform rehearsals six days before opening the performance. Due to illness, he did not arrive until the third day before the opening. The defendant refused to accept his services treating the contract as discharged. The court held that the rehearsal clause was subsidiary to

the main purpose of the contract. The contract did not fail because the singer missed some of the rehearsals. Breach of the clause must be treated as a warranty so that the defendant was entitled to accept the singer's services. He had no right to treat the contract as discharged and must compensate the claimant though he could claim damages if he could prove any loss for failure to arrive in some of the sick days for rehearsals.

- (c) My advice to Gilbert is that he should not proceed to claim payment of the additional sum of K5,000 from James because the promise which James made was made after the contract for the sale of the bicycle had been discharged by performance in that James had paid the contract price and that after the sale had been completed, title in the bicycle had passed to the buyer.

The promise made by James was not supported by any consideration given by Gilbert as promised in line with the rule that consideration must move from the promisee – see *Dunlop v Selfridge (1915)*.

Gilbert cannot, therefore, use the bicycle as consideration for the additional payment because the bicycle relates to the past sale already completed and not to any subsequent promise. In *Roscorla v Thomas (1842)* the claimant agreed to buy a horse from the defendant at a given price. When negotiations were over and the contract had been formed, the defendant told the claimant that the horse was “sound, and free from the vice”. The horse turned out to be vicious and the claimant brought action on the warranty. The court held that the promise was made after the sale had been completed and that it was not supported by fresh consideration. The claim failed.

The principle was also applied in *Re: Mc Ardle (1951)*. Using the principle in the cases above, Gilbert's purported claim is bound to fail and he must not pursue it.

- (a) In relation to the sale of goods, many commercial contracts now contain a clause commonly known as the *Romalpa Clause* or the retention of title clause. The legal significance of this clause is that when a seller sells his goods to a buyer, he usually inserts this clause which entitles the seller to retain ownership or title in the goods sold to the buyer while possession only passes to the buyer until the purchase price has been paid in full.

This has the effect of protecting the unpaid seller from losing property sold if ownership is transferred to the buyer before full payment of the purchase price. Should the buyer sell such goods to a third party, such a person does not get good title since he will have bought goods from the person who did not have title to them.

In *Aluminium Industrie Vassan BV vs Romalpa Ltd (1976)* Romalpa purchased aluminum foil on the terms that the stock of foil and any proceeds of sale should

be the property of the Dutch supplier until the company had paid to the supplier all that was owed. Romalpa got into financial difficulties and a receiver was appointed. The receiver found that the company had not paid its debt to the supplier but still held aluminium foil and the proceeds from selling other stocks of foil. The receiver applied to the court to determine whether or not the foil and cash were assets of the company under his control as receiver. It was held that the conditions of sale were valid.

The relevant assets, although in the possession of the company, did not belong to it but to the supplier. The receiver could not therefore deal with these assets since his authority under the floating charge was restricted to the assets of the company.

- (b) The following are the two possible remedies which an unpaid seller has against a buyer personally:
- (i) He may bring an action for the price if:
 - Ownership in the goods has passed to the buyer and he wrongfully neglects or refuses to pay the price according to the terms of the contract.
 - The price is payable on a certain day, regardless of delivery and the buyer wrongfully neglects or refuses to pay.
 - (ii) The seller may sue for damages for non-acceptance if the buyer wrongfully neglects or refuses to accept and pay for the goods. In this case the claim may include any expense incurred by the seller e.g. in storing the goods, caused by the buyer's failure to take delivery after being requested to do so.

SECTION B

4. (a) As Saimon Ntchito was employed by Timwe Tea Estate Ltd as a casual labour, he was not a permanent employee. On the facts, his job was seasonal which lasted for six months before he renewed it. This means that he was employed to do a specific task for a specified period of time. Under the law, if a person is employed under a contract for a specified period of time e.g. six months, his contract of employment automatically terminates on the date specified in the contract. If he continues to work and receives wages or remuneration, his employment is tacitly deemed to have been renewed or prolonged and he cannot easily be dismissed – see Section 28(2) of the Employment Act 2000.

Applying the above law, Saimon Ntchito's contract of employment, although it was initially for a specified period of time, his employment was deemed to have been tacitly renewed or prolonged due to the employer's conduct by his failure to

let Saimon Ntchito go at the expiry of six months. Consequently, Saimon Ntchito's contract cannot easily be terminated by Timwe Tea Estate Ltd.

Section 28(b) of the Employment Act states that where the purpose or effect of a contract of employment that is purported to be for a specific period of time or a specific task is the filling on a lasting basis of a post connected with the normal and permanent activity of an undertaking, it shall be deemed to be a contract of employment for an unspecified period of time.

- (b) In relation to employment law, a skilled labour is an employee in an undertaking who has special ability to do something which ability is gained through acquisition, programmed or otherwise of knowledge, attitude and behaviour.
- (c) In order for Zakeyo to lodge a complaint for unfair dismissal against PTS Bank Ltd, he may follow the procedure laid down in section 62 of the Employment Act, which is as follows:
 - (i) First, he may, within three months of the date of dismissal, lodge a complaint to the District Labour Officer that he has been unfairly dismissed irrespective of whether or not notice has been given.
 - (ii) Secondly, that this right to make a complaint is without prejudice to any right he may enjoy under a collective agreement.
 - (iii) If the District Labour Officer fails to settle the matter within one month, the matter may be referred to the Industrial Relations Court.
 - (iv) Since section 62 is not mandatory, Zakeyo may also lodge his claim with the Industrial Relations Court instantly.
- (d) The difference between sick leave and maternity leave is that sick leave is leave which an employee is entitled to take when he/she falls sick after completing one year of continuous service. The minimum period of leave is four weeks with full pay and thereafter, eight weeks sick leave on half pay during each year. An employer is not bound to grant sick leave unless the employee produces a certificate from a registered medical practitioner stating the nature of the employee's incapacity (**Section 46 of the Employment Act**).

On the other hand, maternity leave is leave taken by a female employee which she is entitled to take when she is pregnant. She is entitled to take once every three years at least eight weeks (2 months) on full pay (**Section 47 of the Employment Act**). In *Jumbo v Banja La Mtsogolo (2008) MCCR 409* the plaintiff was a temporary employee of the respondent and upon falling pregnant she sought maternity leave but was refused by the respondent and she was dismissed. The

Industrial Relations Court held that the dismissal was unfair and re-instatement was ordered.

5. (a) A registered company is usually formed by the issue of a certificate of incorporation by the Registrar of Companies. To obtain a certificate of incorporation, Jacob must deliver to the Registrar prescribed documents bearing the name of the proposed company. The documents which he should deliver to the Registrar include:
 - (i) A Memorandum of Association which is signed by at least two subscribers. In the case of a single member private company, only one member may subscribe to the memorandum. The signature must be dated and witnessed.
 - (ii) Articles of Association which should be signed by the same subscribers as those who sign the memorandum. This must also be dated and witnessed. Alternatively, the memorandum of a company limited by shares may be endorsed “registered without articles of association”. The statutory Table A articles then become the company’s articles in their entirety.
 - (iii) A statement, in the prescribed form, known as Form 10 which gives detailed particulars of the first directors and secretary and of the first address of the registered office. The persons named as directors and secretary must sign the form to record their consent to act in this capacity. When the company is incorporated, they are deemed to be appointed.
 - (iv) A statutory declaration in Form 12 made by the lawyer who was engaged in the formation of the company or by one of the persons named as directors and secretary explaining that all the requirements of the Companies Act, in respect of registration, have been complied with.

When an appropriate fee has been paid, the Registrar considers whether or not the documents are in order and whether or not the objects specified in the memorandum are lawful. If he is satisfied with these, he gives the company a registered number, issues a certificate of incorporation.

- (b) In relation to company law:
 - (i) Authorised share capital is the maximum share capital which is contained in the company’s Memorandum of Association. It is also known as the registered share capital or the nominal share capital.

- (ii) Issued share capital means the shares which have been issued to the shareholders of a company. It is the aggregate nominal value of the shares which the company issues.
 - (iii) Paid up share capital refers to the amount of money which is paid to the company by the shareholders.
 - (iv) Called up share capital refers to the aggregate amount of the calls made in the shares. This usually occurs when the company has issued partly called shares and wishes to raise more money. It can then make a call on the shares and the shareholders are contractually bound to pay.
- (c) The following are the grounds necessary for compulsory liquidation of a company:
- (i) The company has, by special resolution, resolved that it should be wound up by the court.
 - (ii) Where the business or objects of the company are unlawful.
 - (iii) The number of members (shareholders) of a public company has been reduced to below two.
 - (iv) The company has not commenced business within a year of incorporation or has suspended its business for a year.
 - (v) The company is unable to pay its debts. (This is the most common ground);
 - (vi) The court considers that it is just and equitable to wind up the company.
 - (vii) Where the period fixed for its duration expires.
 - (viii)** If the company has persistently failed to comply with the provisions of the Companies Act.
6. (a) When an agent has been appointed by his or her principal he or she may be expected to exercise any of the following types of authority:
- (i) Actual authority – this is the authority which he or she has actually been given by the principal. It may either be express or implied.

- (ii) Apparent or ostensible authority – This is a kind of authority which the agent has as it appears to others. He may plainly appear to others to have a certain authority which he or she actually possess.
 - (iii) Incidental Authority – this is the authority given to an agent which is usually in respect of his or her primary tasks. It is generally implied that he or she also has authority to do all such things as are necessarily incidental to the performance of the duties given by his or her actual authority.
 - (iv) Usual Authority – this is the kind of authority given to agents in particular trades or professions requiring them to carry out certain sets of duties e.g. insurance brokers, stockbrokers and solicitors etc. If a person in one of these trades or professions is employed in respect of that business as an agent, then he is presumed to have authority to do whatever is usually done by agents in that particular business.
 - (v) Customary Authority – this kind of authority is similar to usual authority except that it applies to customs or usages of a particular place as opposed to a particular business. For example, if a particular place or area recognizes and accepts a particular rule or right applicable in that place or area, an agent is deemed to have authority to apply such rule or exercise such right.
 - (vi) Presumed Authority – this is the kind of authority which an agent is presumed to possess. It relates to certain relationships which involve one person acting as an agent e.g. husband and wife or parent and child. In such cases the agent is presumed to have a certain authority.
- (b) The following are the five fiduciary duties which an agent has towards his principal:

- (i) Duty to make full disclosure

An agent is required to act in the best interest of his principal, or at least what is considered to be his principal's best interest. If his principal's interests conflict with his own, he is not automatically barred from acting but he must first make full disclosure to his principal his own personal interests in the matter. The principal may then be in a position to decide whether or not the agent should proceed with the matter. The most common examples of an agent's interest that are likely to conflict with those of his principal include the following:

if the agent buys the principal's property, or if he sells his own property to his principal, receives commission from both parties to a transaction, or if he stands to receive a benefit from some person other than the principal.

The agent is under a duty to explain his personal interest as a result of the agency.

(ii) Secret profits

Usually, a contractual agent receives an agreed fee or commission for his services. He is not authorized to make any additional profits as a result of the agency unless he discloses them. An agent is liable to account to his principal all secret profits which he makes.

(iii) Duty not to receive bribes

If an agent receives bribes or accepts secret commissions, the principal may make him account for the secret bribe or commission and may exercise any of the prescribed remedies including dismissal, recovery of the secret bribe or commission, bring action for damages against the person who gave or promised to give the bribe, repudiate the whole transaction, among others.

(iv) An agent must not use his position to acquire a benefit or secret profit from a third party. If he does so, he is required to account to the principal the benefit he may have obtained.

(v) An agent has a duty to keep property or money belonging to his principal separate from his own. He is also under a duty to keep proper and accurate account of all transactions carried out in the course of his agency. He must produce such accounts and supporting documents to the principal on demand. For example, law firms are required, as a matter of law, to operate separate accounts from those of their clients.

7. It is true that the tort of strict liability results from breach of absolute duty. This is so because in many other torts the defendant is liable because he acted intentionally or at least negligently. He may escape liability if he can show that he acted with reasonable care.

But the tort of strict liability imposes liability on a person who may have taken reasonable care. The outstanding tort of strict liability is the rule in *Rylands v Fletcher (1868)* which provides that a person who, for his own purposes, collects, brings and keeps on land in his occupation anything likely to do mischief if it escapes, he must keep it at his peril, and if he fails to do so, he is liable for all damage naturally accruing from the escape.

In *Rylands v Fletcher Case* Fletcher employed competent contractors to construct a reservoir to store water for his mill. In their work the contractors uncovered old mine workings which appeared to be blocked with earth. They did no more to seal them off and it was accepted at the trial that there was no want of reasonable care on their part.

When the reservoir was filled the water burst through the workings and flooded the mine of Rylands on adjoining land. The court held that Fletcher was liable and the principle quoted above was laid down.

- (b) The tort of negligence is about breach of a legal duty to take care which results in the plaintiff being injured. In order for the plaintiff to succeed in an action for negligence, he must show that he was owed a duty of care by the defendant, that the defendant broke that duty and that the plaintiff suffered injury as a result of the defendant's breach. These three elements were clearly established in *Donoghue v Stevenson (1932) AC 562* in which the defendants were manufacturers of ginger beer. A friend of Donoghue bought a bottle of ginger beer and gave it to Donoghue. The plaintiff took some beer, but when she poured out the remainder, she discovered that there were remains of decomposed snail in the liquid. She suffered severe shock and became very ill. She brought action against the manufacturers (Stevenson). It was held that the defendants, being manufacturers of the ginger beer, owed the plaintiff a legal duty of care as the ultimate consumer or purchaser of the beer. The defendants failed in their duty to ensure that the bottle was clean and safe before they filled the liquid. Failure to do so amounted to breach of duty as a result of which the plaintiff was injured. The defendants were therefore liable.

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